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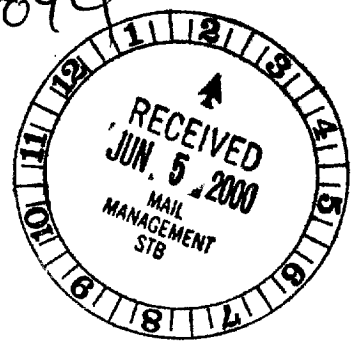
June 5, 2000



Mr. Vernon Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423-0001

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Via Hand Delivery

Dear Mr. Williams:

Enclosed, for filing in Ex Parte 582 (Sub-No.1), Major Rail Consolidation Procedures, are the Reply Comments of Williams Energy Services and the accompanying Reply Verified Statement of Tom O'Connor.

We have provided the original and 25 copies of the filing, as well as an electronic version in WordPerfect 7.0.

We would appreciate it if your staff would date stamp the second copy of this letter for return to us. Should questions arise, please call me at (202) 371-9149.

Thank you.

Sincerely,

Tom O'Connor
Vice President

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BEFORE THE

SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF WILLIAMS ENERGY SERVICES

And Reply Verified Statement of

Tom O'Connor

Snavely King Majoros O'Connor & Lee, Inc.

1220 L St. NW

Washington, DC 20005

Dated: June 5, 2000

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF WILLIAMS ENERGY SERVICES

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF Williams Energy Services

Introduction

Williams Energy Services ("Williams"), by Counsel, respectfully submits these Reply Comments pursuant to the Board's decision of March 17 and its Advance Notice of Proposed Rulemaking ("ANPR"), served March 31, 2000.

The identity and corporate structure of Williams and its family of companies was described in Williams' initial Comments filed on May 16, 2000. That description will not be repeated here. Suffice it to say that Williams is a major rail shipper with more than 15,000 rail carloads per year in the US and Canada.

The following reply comments are based on a review of the initial comments of the Class I railroads and other parties. In addition to the major railroads, this review

covered responses from shippers and shipper groups, cities and port authorities, short line railroads and associations, labor interests, several state government agencies, and two federal cabinet departments, the Department of Transportation (USDOT") and the U.S. Department of Agriculture ("USDA").

General Statement

In its initial comments, Williams proposed that any future consideration of major railroad mergers by the Board should be separated into three phases:

- Corporate,
- Business and
- Operational.

The USDOT agreed with the basic concept of a staged approach to the approval process, although it proposed that the stages, and the timing of those stages, be recommended on a case-by-case basis by the applicant railroads. Williams suggests that the past performance of the railroads in managing mergers casts doubt on the wisdom of assigning to them the responsibility for planning the Board's merger assessment procedures.

In these Reply Comments, Williams will expand on its earlier proposal by classifying the issues raised by the commenting parties according to its recommended three phases of merger consideration. We will demonstrate that the Board can most efficiently deal with future mergers by considering these issue areas separately and sequentially.

The need for a phased consideration of merger application is obvious when one considers the "Catch 22" nature of railroad consolidations. In the past, the Board has been required to evaluate mergers based on promises of improved efficiency. The most recent two mergers have demonstrated forcefully that whatever the long-run efficiency gains, the near term effect has been negative, indeed, destructive to many shippers (including Williams) and to the railroads themselves. No one predicted these service disruptions, nor could they have been accurately predicted by the most prescient observer at the time of the merger. The Board thus approved each merger without accurate information as to its consequences on service quality.

Somewhat the same problem relates to competitive effects. Every merger results in some loss of inter-railroad competition. This is true even of end-to-end mergers. And it will continue to be true unless the Board drastically revises its policies such as those that currently award monopoly-like power to railroads in bottleneck situations. As a result, each merger precipitates a hurried examination by potentially affected shippers of the likely impacts of the merger on its bargaining position not only with the merging railroad, but non-applicant railroads as well. What follows is an almost frenetic pursuit of protective arrangements by hundreds, if not thousands of shippers. These arrangements include trackage rights, haulage rights, special rates and commitments to create or maintain service by railroads. The combined effect of these proposals can change the structure of the merger from that originally proposed, and this in turn changes its underlying economics. Again, the Board is asked to rule on cause and effect at the same time.

It is for these reasons that Williams proposed in its initial comments that the Board

separate its consideration of rail mergers into three phases, each involving different issues, different evidence and a separate decision.

1. The Corporate Merger

The initial phase would address, first and foremost, the threshold issue of whether the merger is in the public interest at all. Both of the federal cabinet departments question whether there are any further efficiency gains to be realized from additional mergers of Class I railroads. Both cite studies which demonstrate that end-to-end mergers – the only type of merger left – yield little benefit in terms of reduced cost and improved productivity. Both cite the concern that further mergers will reduce the already depleted level of rail-to-rail competition. Finally, both question whether the size and complexity of rail operations has not reached the limits of a single corporate management.

USDA's discussion of this issue concludes with the recommendation that the Board should adopt a "rebuttable presumption" against any further major rail mergers. To overcome this presumption, the applicants must produce a plan that mitigates any adverse consequences of the merger upon shippers and other railroads, proves the existence of merger-related benefits, and demonstrates that those benefits cannot be achieved by other means short of merger.

The key point is that this issue precedes all other issues. According to the USDA, if the merger is not in the public interest it should be disallowed in its entirety, and issues of its competitive effect and its impact on service quality then become moot.

Accordingly, the Corporate merger decision would address the public interest of the merger: efficiency benefits, overall competition impacts (but not on individual shippers), and the "downstream effects" which every commenting party except the two applicant railroads – BNSF and CN – believe should be considered in some depth by the Board.

2. The Business Merger

Once the Board has determined to allow the merger, the two corporate entities may then consolidate, exchange or buy stock, select a common board and senior executive staff, and assume the corporate umbrella of a single company. However, they may not, at this point, merge their businesses or their operations. For the time being, they continue to function as two separate and competing entities.

At that point, the Board takes up two broad issues, competition and service integration.

a. Competition

With regard to competition, the Board will already have addressed the broad plans of the merging railroads on how to minimize the adverse competitive impacts of the merger – impacts that are so adverse as to challenge the public interest of the entire consolidation. It now addresses the detail, that is, the effect on individual shippers and railroads.

The Board could greatly simplify its task if it would, in this proceeding, revise the

competitive policies in the manner it has proposed in the ANPR. Importantly, these revisions have received the support of virtually every shipper party – and even some railroads – that commented on those issues.

First, every single commenting party, including all of the railroads, supported the Board's proposal that merging railroads should maintain open gateways for all major routings.

Second, all shipper parties supported the concept of reciprocal switching as a means to enhance competition. In the accompanying Verified Statement, Mr. O'Connor proposed that the Board adopt the Canadian concept of "Interswitching," whereby any captive shipper located within a given distance (30 km in Canada) from an interchange point with a competing line-haul railroad is entitled to switching to that railroad. Ideally, the switching charges should be negotiated, but in the absence of agreement, they should be arbitrated by a disinterested third party or set by the Board.

Third, every shipper party that commented on the issue supported the Board's suggestion that the current rules governing bottleneck rates be revised. Most agreed with the specific proposals to require applicant railroads to provide contracts on competitive segments when the joint-line partner has the bottleneck, and concomitantly, to require the applicant to provide a new through rate when the applicant has a bottleneck segment and the shipper has a contract with another carrier for the competitive segment.

However, these changes alone are not enough. The objective of these proposals is

to isolate bottleneck rates so that they can be challenged by the shipper. This opportunity, however, is of little value so long as the standards for evaluating bottleneck rates are structured so that no shipper can realistically expect to obtain relief. According to the National Industrial Traffic League ("NITLeague"), no shipper has ever successfully challenged a bottleneck rate. That is because a shipper must clear a series of extraordinary evidentiary hurdles in order to have a rate reduced to reasonable levels. If its new merger rules on bottleneck rates are to have any meaning whatsoever, the Board must revise its maximum rate standards to provide effective and realizable shipper protection from these unreasonable charges.

Finally, the Board must abandon its "one lump" theory on rail mergers. This theory holds that when one segment of a movement is subject to monopoly pricing before the merger, the controlling carrier will have already extracted all the monopoly revenue (the one lump) available from the movement. The theory further predicts that extension of the monopoly service conditions to the entire (or a greater proportion) of the movement will therefore not harm the shipper.

The NITLeague aptly describes the one-lump doctrine as a triumph of theory over experience. Mr. O'Connor, in his attached Verified Statement, confirms this characterization. He has participated in numerous rate negotiations and has found that the shipper's leverage over the carriers' rates is closely correlated with the proportion of the movement over which there is competition. This intuitively obvious conclusion is, of course, contrary to the one-lump theory.

If adopted, the foregoing changes in the Board's policies would represent a 180 degree shift in the Board's approach to shipper's interests vis-à-vis the railroads.

Such a shift is absolutely necessary if the Board is to follow through on its stated intent to use enhanced competition as an offset to adverse effects of further increases in railroad concentration.

Moreover, these policy changes should be made now, before further mergers are considered. The railroads are arguably correct that such devices as reciprocal switching and bottleneck rate rules are not purely merger issues. However, the railroads are definitely incorrect in implying that they are unrelated to mergers. To the contrary, if further concentration within the railroad industry requires the adoption of more pro-competitive policies, then those policies should be announced before the mergers begin, not after the industry has contracted to two duopoly carriers.

If, as proposed, the Board does announce these policy changes, then the terms and conditions of merger will be greatly changed. It will no longer be necessary to evaluate separately each shipper's appeal for relief from increased pricing power. Instead, all shipper complaints will be governed, and hopefully resolved, by comprehensive pro-competitive rules and procedures.

The Board's second phase business merger decision will be the vehicle by which it applies its newly pro-competitive policies to the specific merger in question. It will, for example, identify the interswitching zones, the gateways, and the ratemaking principles that will govern the newly merged business entity. It will also establish the appeal, arbitration, or adjudication procedures for any controversies that may arise from the implementation of these procedures.

b. Service Quality

Virtually every party submitting comments in this docket referred to the serious service disruptions that occurred following the last two major carrier mergers. All agreed that more detailed planning, better surveillance and improved shipper protections are required. Typically, the commenting parties called for implementation plans containing details as to the plans and procedures for merging the various business and operational systems of the two railroads. These plans would be in addition to the already extensive data required from applicant railroads under Sections 1180.6 through 1180.9 of the Board's rules.

Commenting parties proposed other types of plans as well. A number called for separate safety plans, and the DOT proposed that the applicants submit contingency plans covering all corridors and switching locations likely to be affected by the merger.

Of considerable interest to the commenting parties are the metrics used to determine the impact of the merger. Necessarily, these metrics require the establishment of performance benchmarks on each of the merging railroads prior to the merger. Most shippers pointed out that relevant benchmarks should not be on a system basis, but at more refined levels of detail, whether regionally, by type of service, or by type of equipment.

These plans and benchmarks should be part of the applicants' filings in the business merger phase of the approval process. They should be subject to review and comment by all parties. The evaluation, modification and approval of these

plans would be part of the Board's decision in this second, business merger phase.

3. The Operational Merger

The principal distinction between the Williams merger proposals and those of other parties is our recognition that it is one thing to write a plan, and another to implement it. We propose that the approval of an implementation plan be only a preliminary step in the operational merger of the applicant railroads. First, there must be a period of testing and trial to prove that all incompatibilities between the railroads' operating systems are resolved and that the capacity of each segment of the newly merged systems is adequate for the traffic loads put upon it.

For this reason, we propose that the approval of the implementation plan be conditioned on the successful completion of tests and field trials under actual operational conditions. This may involve the temporary operation of parallel pre and post merger systems, simulation studies, and sample movements and train operations. It will certainly involve quantification of the various measures of pre vs. post merger performance.

The need for this testing stage is clearly demonstrated by the experience of recent mergers. The planning staffs of the UP, SP, CSXT, NS and Conrail railroads were as capable and professional as any in the world. No doubt they believed that they had anticipated all possible problems and contingencies. Yet the implementation of their mergers was fraught with unforeseen difficulties, resulting in congestion, misroutings, lost cars, even lost trains.

The objective of the trial and testing phase is to avoid these sorts of problems or, if that is not possible, to identify them before they result in system meltdown. The design and structure of the test and trials will have been identified in considerable detail in the planning phase, as will the schedule of performance measures and milestones. The results of these trials will be reported on a scheduled basis to the Board and its staff.

A number of parties expressed concern that the size and complexity of the evaluations needed for an informed judgement as to the suitability of the railroads for final operational integration may be beyond the capacity of the current Board staff, which is limited in size. The solution to this, as proposed by one railroad, is to hire consultants to plan and conduct the field testing programs. These consultants would be hired by the Board and subject to its (and its staff's) supervision. Their cost would be covered by the applicant railroads.[1] We concur with this recommendation. As pointed out in Mr. O'Connor's Verified Statement, this type of arrangement works well in the Board's existing review of Environmental Impact Statements.

Hopefully, the trial and testing phase will forestall any serious service disruptions and eliminate the need for shippers to seek redress from the merging carriers. Nevertheless, during this phase, the Board should develop the detailed procedures

[1] Exactly this procedure is being employed by the Federal Communications Commission and a number of state commissions in connection with their testing of the performance measures required for the Bell Operating Companies to qualify for long distance service provision under Section 271 of the Communications Act.

by which shippers can secure damages from the railroads in the event the operational merger results in losses to them.

The comments of the parties offered a number of plans and procedure for compensating shippers for merger-related service disruptions. All parties understand the need to isolate performance shortfalls that relate to the merger from those that could result from exogenous causes such as Acts of God, sudden traffic surges, or changes in shipping patterns. What many, but not all, parties recognize is the need to compensate shippers for all merger-related costs.

As the attached analysis of Mr. O'Connor indicates, past mergers have resulted in shippers suffering a "lose-lose" condition. First, they lose by reason of the service disruptions; then they lose again when the railroads pass through their cost increases in higher rates. This must not happen again. The Board should declare a firm policy that railroads launch mergers at their own risk and that shippers are entitled to full compensation for any merger-related losses they suffer.

Some railroads propose to handle this issue through contracts. This approach has the desirable aspect of being enforceable in court of law. However, as Mr. O'Connor's detailed analysis demonstrates, the railroads' proposals fail to provide adequate shipper protection. For example, the railroads are highly reluctant to commit to service quality guarantees. About the best that is offered in this round of responses is the UP's offer to compensate shippers who suffer more than a 50 percent decline in their service performance over a prolonged period. While this is flatly inadequate, UP appears to have offered the proposal as a starting point for discussions. Adjustment of both the percentage decline in service and the period

during which such would be sustained could change the UP proposal into a workable solution.

Other railroad proposals turn shipper protection on its head. For example, one railroad proposal would require the shipper to suffer inadequate service for up to 150 days before it can even apply for redress. Meanwhile, the shipper (not the carrier) becomes liable if its shipments fall below the minimum volume guarantees of the contract.

This problem of shipper protection would be addressed in this final trial and testing phase. The reason for delaying this issue is the uncertainty, up until the final structure of the merger is known, as to the nature and extent of shipper risk caused by the merger. Hopefully, a fully transparent trial and testing program will convey to each shipper the degree to which the merger puts it at risk and the extent of protection it requires.

When finally the merging railroads have demonstrated that their operating systems are fully integrated and their traffic flows matched to the capacity of their facilities, the Board can then issue an approval that allows the applicants to consolidate fully their operations. There can be no pre-determined schedule for this approval. It should be driven entirely by the standards and milestones of the field testing program.

Conclusion

The foregoing discussion of the comments of the parties has demonstrated that the

Board faces not one but a sequential series of decisions with regard to future railroad mergers.

First, it must determine in this proceeding what its approach to competition will be. Hopefully, it will decide to tilt its policies and rules toward the preservation and enhancement of competition in the manner suggested in the ANPR, supplemented according to the recommendations contained in these Reply Comments and the accompanying statement of Mr. O'Connor.

Then, it must recognize that there are basically three sets of decisions it must make in each merger case:

- Is the merger in the public interest?
  ..then
- How can competition be protected?
  ...and
- How will the merger be implemented?
  ...then
- Are the railroads' systems and operation sufficiently integrated to function effectively, efficiently and smoothly?

Williams respectfully submits that this is the appropriate roadmap for the Board's consideration of future mergers.

Respectfully Submitted,

On behalf of

Williams Energy Services

By

Charles W. King*
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Suite 410
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Washington, DC

*Admitted to ICC practice, June 2, 1967

SK Snavely King Majoros O'Connor & Lee
Economic and Management Consultants

Before the Surface Transportation Board

Reply Statement
on Selected Issues in
STB Ex Parte No. 582 (Sub-No. 1
Major Rail Consolidation Procedures

Filed on Behalf of
Williams Energy Services

REPLY VERIFIED STATEMENT OF

Tom O'Connor
Vice President
Snavely King Majoros O'Connor & Lee, Inc.
1220 L St NW
Washington DC 20005

Dated: June 5, 2000

I. EXECUTIVE SUMMARY

My name is Tom O'Connor. I am Vice President of the economic and management consulting firm of Snavely King Majoros O'Connor & Lee, Inc. I have served as an economist with the ICC, the USRA, Conrail, the AAR and two consulting firms, including my present firm.

I previously provided testimony in this proceeding on behalf of Williams Energy Services Corporation ("Williams"). In my Opening Statement I reported the results of analyses through which we developed, in collaboration with Williams, recommendations on rule revisions designed to retain, and enhance intra-modal rail competition. In preparing this Reply Statement, Williams requested that I review the filings made by others in this case and report the findings.

Williams is a major chemical company which applies sophisticated supply chain management techniques to minimize transit times, inventory levels and costs to itself and its customers. Williams, like most rail shippers, has been forced to contend with massive service disruptions in the wake of the UPSP and NS-CSXT CR mergers.

The Opening Statement on behalf of Williams focused on three major improvements in the merger process:

(1) recognition of downstream effects,

(2) promoting and enhancing competition, and

(3) maintaining efficient rail service.

Review of the record has identified overwhelming support for these and similar measures. The unifying characteristic of these measures is that they accord greater weight to the public interests and the interests of rail shippers, especially shippers like Williams who have somewhat limited transportation options.

The breadth and diversity of support for these measures is itself instructive. Railroads, Government Agencies, Shippers and others, many of whom were battered by the adverse consequences of recent mergers, are coming to the same conclusions. Those conclusions can be summed up in four points:

1. Rail mergers have achieved the goals of system rationalization and efficiency improvement which motivated the Staggers Rail Act of 1980.

2. Beginning with the UPSP merger and continuing with the NSC-CSXT acquisition of Conrail, rail mergers have caused declines in efficiency, income and productivity. Much of this decline stems from diminished competitive alternatives.

3. The availability of competitive alternatives enables the market to operate efficiently and to achieve gains for all. The loss of competition leads predictably to losses in efficiency, productivity and income which are sustained widely in the marketplace.

4. It is no longer the case that rail mergers can be presumed to be engines of efficiency. This can be remedied only by designing them or conditioning them to

enhance and promote competition. The regulatory process now needs to be modified so that it enables this competitive energy to be applied in the marketplace.

In this statement we review the regulatory adjustments in terms of their ability to facilitate market processes and to do so effectively and efficiently.

Among the most effective are the three we recommended in our Opening Statement:

A. Downstream Effects

We recommend that the STB recognize and remedy the fact that further rail mergers will inevitably lead to duopoly. STB will need to strengthen the weakened intra-modal competition that will result from such duopolies. If simpler measures fail, structural changes such as took place in the telephone, natural gas and electric utilities industries may be adaptable to the rail industry to create effective competition.

B. Competition

With respect to competition, in the opening statement we explored several policy options available to the STB.

1. Maximum Rate Regulation

2. **Changes to the Bottleneck Rate Situation**
   - ***We strongly recommended, as did numerous other parties, that the STB revise its practices to allow shippers to challenge bottleneck rates and charges specifically.***

3. **"Build In" of Competing Rail Lines**

4. **Unlimited Open Access**

5. **Limited Open Access Solutions**
   - ***We recommended, as did many other respondents, that limited open access approaches be adopted aggressively as conditions for future mergers. These are remedies with proven effectiveness which are already within the STB's regulatory authority.***

C. Service

A primary consideration for many rail shippers, particularly those with limited non-rail options, like Williams, is the quality and reliability of rail service. The definition of rail service is a straightforward task. Many of the respondents observed accurately that the relevant dimensions of service are known and measurable. The process of producing rail service also relies on well-defined technology known widely throughout the world. The remedy then would seem to be equally straightforward:

- Measure the process; identify the variance from target; correct it.

The role of regulatory policy is simply to establish a coherent framework within which this can occur. That leads us to a sixth policy option, also readily available to the Board: merger oversight.

6. Merger Oversight

- ***We recommended, as did many others, that the STB set operating benchmarks before the merger based on normalized pre-merger performance, and refine the benchmarks to detect shortcomings at the regional and local, as well as system, levels. We also recommended a 3 Stage Merger Approval process to prevent further difficulties with service problems that planning is unable to foresee.***

- ***To assure a factual basis for these remedies, particularly merger oversight, we recommend that the STB require uniform reporting of operating and financial data and common levels of disclosure for both U.S. and Canadian railroads involved in mergers.***

As this Reply Verified Statement shows, the problems are well understood, reasonable solutions are well defined and the authority to apply such solutions is either already at the Board's disposal, or could be readily requested.

While many of the underlying facts have not changed in the past few years, as the responses show, something basic has changed. We find a sea change in the growing

and increasingly widespread awareness of the imperative need to stop and apply simple structural remedies before going further down the rail merger path.

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II. Introduction

A. Statement of Qualifications

My name is Tom O'Connor and I am Vice-President of Snavely King Majoros O'Connor & Lee (Snavely King), an economic and management consulting company. I have been engaged in the business of economic analysis for more than twenty-five years, beginning in 1973 as an economist with the Interstate Commerce Commission (ICC), predecessor of the Surface Transportation Board (STB). A detailed statement of my qualifications is contained in Appendix A to this statement.

During my career I have served in a range of positions which give me different perspectives on the merger process, its problems and its solutions. These positions include:

- Staff of the ICC, the rail regulatory agency.
- Member of the original USRA team that created Conrail out of the wreckage of six bankrupt railroads
- Part of the management team that operated Conrail
- Part of the railroad trade association team that helped design and implement the Staggers Act and
- Consultant and advisor to railroads and shippers in US, Canadian and overseas transportation marketplaces of varying degrees of deregulation.

Throughout this process, a few fundamental principles have proven true, time and

again. The most important of these principles is the importance of allowing the competitive market to operate.

Virtually all of the problems voiced in this proceeding could be readily solved by the availability of a fit, competing railroad. The Staggers Act was passed in response to valid concerns that the rail industry was withering under the hand of regulation. That problem was squarely faced and solved in the intervening years.

Now a new problem has emerged. Railroad consolidation has advanced to the point at which the most recent two mergers seemed to fall under their own weight. Experienced and skilled railroad people seemed unable to operate one of the oldest technologies, and one they were masters of.

This is a process in need of adjustment. As we shall show in this statement, the key to the remedy is simply to return to first principles and allow the competitive market to operate.

- The most basic requirement is access to the competition:
  - **We recommend Limited Open Access.**

- The next requirement is application of a rule of reason in designing and applying such regulatory procedures as might be needed:
  - **We recommend Revamping of the Bottleneck Rates Rules.**

- The ongoing requirement is to ensure that service is adequate and responsive:
  - **We recommend Benchmarking Service and Incentivising its Performance**.

B. Summary of the Review of the Responses

In collaboration with Williams, I have examined the issues, including analysis of the record developed at the STB's hearings and the Opening Statement filings. In this section we present our analysis of those issues.

1. Downstream Effects

In addressing the issue of downstream effects, the railroad industry is somewhat split on the extent to which this issue should be considered by the STB. The carriers involved in the most immediate merger contend that the STB should maintain its one at-a-time rule or that the STB should carefully define and limit the downstream effects to be addressed by the merged railroads. This position is echoed by the CP which advocates that downstream mergers be considered but not be used as a basis to make a decision in the proposed merger. Some also commented that there is no way to predict if a subsequent merger will be 'triggered" or the combinations that would be proposed.

Most of the large railroads took the position that evaluation and consideration of the downstream effects are critical factors in analyzing any proposed merger. They assert that almost certainly additional mergers will be filed as a result of an initial merger filing and approval.

In regard to this issue, the question was raised as to whether one can accurately predict that a major merger in today's rail market will trigger other consolidations and mergers. One only has to look at history. [1]

When BN acquired the St. Louis-San Francisco Railway Company, UP countered by combining with Missouri Pacific and Western Pacific. UP later justified its control of Chicago & North Western Transportation Company as a counter to SP's purchase of The Denver and Rio Grande Western Railway Company. UP has publicly stated that its merger with SP was in response to the BN-ATSF merger.

The same pattern can be seen in the East where Chessie System merged with the Seaboard Coastline and the Louisville & Nashville to form CSX Transportation. In response Southern Railway System merged with the Norfolk and Western to form Norfolk Southern. Railroads resist letting their competitors become significantly stronger without seeking equalizing combinations. This situation is graphically illustrated in the split of Conrail between Norfolk Southern and CSX Transportation. This reactive behavior occurs to maintain competitive parity.

[1] The KCS Opening Comments provided good summaries of the merger history.

Comment

- It is reasonable to conclude that this reactive pattern, on the part of the non-merging railroads, will continue until the "end game" is reached, resulting in two major transcontinental railroads.

- The corollary conclusion is that downstream effects must be recognized.

2. Bottleneck Rates

The bottleneck rate issue generated a range of comments from the railroads including positions such as:

- it is not a merger issue;
- establish contract or common carrier rates in relation to gateways; and,
- bottleneck rates should be allowed to be challenged separately under certain conditions.

Countering the assertions of other railroads that bottleneck rates are not a merger issue, UP clearly illustrated a situation where a movement with a bottleneck rate would be impacted by the merger of two of the potential carriers in that haul (UP Comments, pages 11- 12). The illustration provided by UP is parallel to the example we included in our opening statement under "Operational Alternatives - Line-Haul Service."

Comment

- UP's proposal falters by seeking to require that market dominance first be proven for the entire movement between origin and destination. This would still deny a shipper the opportunity to challenge a bottleneck rate separately if the balance of the rate is not a contract rate.

A point worth noting regarding bottleneck rates is that not all bottleneck rates are between origin or destination and a major gateway. Class III railroads or shortlines could establish bottleneck rates to their interchange points with Class I connections. While meeting the criteria of a bottleneck rate, this situation does not necessarily involve a major gateway.

Comment

- Setting aside the consideration of whether or not a gateway is involved in the movement, our recommendation remains to allow the bottleneck rate to be challenged without regard to the nature of the other rates in the movement, i.e. contract or tariff.

- While some railroads appear to have addressed this issue, none put forth a remedy to today's protected nature of bottleneck rates. More is required, as we have shown.

3. Limited Open Access

As we expected, the railroads were unanimous that the issue of access should not be handled under merger proceedings, but rather in connection with the general rules of competition and service issues.

Comment

- In advocating open access on a limited scale, in situations where mergers reduced or eliminated competition, we offered four types of proven operational solutions. These were: haulage rights; trackage rights; reciprocal switching; and joint facilities. Each of these have been implemented in past mergers to restore competition.

- In addition to operational solutions, we also recommended commercial solutions in our initial statement. Canada has for years operated with a rail duopoly. Two solutions Canada has developed to enhance competition are:

  (1) Interswitching and

  (2) Competitive Line Rates (CLR).

Briefly, interswitching can occur when a shipper can access within 30-kilometers of its plant a second carrier which can interchange with the carrier currently serving the plant. Interswitching enables a rate to be prescribed between the interchange point and the origin or destination.

The second Canadian solution, CLR, applies when a shipper has access to only one carrier at origin or destination and a continuous route between those points is operated by two or more carriers. The shipper must be beyond the 30-kilometer distance Interswitching limit. This mechanism can require the local carrier to establish a rate from origin or destination to the nearest interchange with the connecting carrier. Though not used to the degree that Interswitching is, its availability alone has enhanced shipper's competitive options in the marketplace.

Despite the fact that the Canadian railroads did not prominently mention these alternatives, other respondents, like us, did note the techniques and recommended them. These mechanisms are in place and working. They have well defined limits on their application, which provides assurances to those who fear broader solutions. And they are quite effective. The duopoly in Canada that resulted in these competitive provisions is not unlike the merger "end game" that is a distinct possibility in the U.S.

Comment

- We recommend adoption of the proven solutions recommended above.

4. Regulatory Merger Oversight

Only one railroad specifically identified an oversight time frame. This was set at five years but no mention was made of it becoming a mandatory requirement. While this time frame is reasonable and in line with our position, we believe that the oversight process should be mandatory and included with the approval of any merger by the STB.

This is in contrast with the current situation in which oversight is optionally imposed as a condition of approving a merger.

Comment

- While we believe that five years is a sufficient time frame for oversight, from the date the merger becomes effective, it must be made a mandatory function of the approval process. This makes the merging entities aware of the conditions under which they will operate in the post merger environment.

5. Operational Alternatives - Line-Haul Service (Gateways)

The views of the railroads differed in language but were similar in content. They, and virtually all other parties, generally agreed that gateways should remain open if they were:

- merger related gateways;
- currently used gateways; or
- classified as efficient gateways.

Comment

- The dominant theme is to maintain the current situation. All of the major gateways would be affected by the formation of two transcontinental railroads.

- The gateways identified by NS (p.37) as being affected by the formation of east-west transcontinental railroads are the same ones that we identified as being impacted by transcontinental railroads.

We noted no commonly accepted definition of what constitutes an "efficient gateway." The railroads were vocal in stating that they did not want a return to the so called 'DT&I" conditions, where all gateways remain in a pre-merger status. The CN went so far as to state that the railroad should be required to propose some form of commitment in maintaining open gateways.

Comment

- Railroads also made the point that in the past the STB and ICC have rejected the position that end-to-end mergers reduce competition through foreclosing connections with independent railroads. However, when those decisions were made, the STB and ICC were not analyzing railroads with operations on a transcontinental level.

- As the railroads quite aptly point out, the situation in the railroad industry is different now and different rules should apply on some issues. We recommend maintaining existing major gateways as open.

- Given the current number of Class I rail systems and the routing options available to shippers it may not be practicable to re-open closed gateways. This could change if the competitive options are not strengthened

6. Operational Alternatives - Local Service

The railroads position on opening terminals to reciprocal switching or operation by a switching carrier was the same as increasing competition in line-haul operations, i.e. it is not a merger issue and should be handled under the general rules on competition and service issues.

Comment

- Again the railroads seek to deflect discussion of increasing competitive options, which we believe to be the only sure avenue toward a solution.

In past mergers large industrial switching facilities have almost always remained under the total control of the consolidated rail system. In the UP/SP merger the Houston terminal area was finally operated under joint dispatch with BNSF. The operations in Buffalo, acquired by CSXT as part of the Conrail merger, are now under study by the STB, due in part to the operating congestion in that area.

Prior to the merger the reciprocal switching rights of some railroads were eliminated in Buffalo. Some highly industrialized areas that are also major interchange facilities develop much worse congestion in a post merger environment due to a change in management decisions and the procedure of consolidating the merged operations. Due to the high dollar value of the traffic handled at the facility the consolidated system is often reluctant to relinquish operational control.

Comment

- Our suggestion of giving reciprocal switching rights to another carrier would not impact the switching operations within the location or control of the facility, only the in and out bound line-haul movements. The insertion of a terminal switching operator releases the current owning railroad of the responsibility of switching cars into and out of customer locations and permits greater focus on their line-haul operations and service.

- Many of the service problems in the last two mergers can have their sources traced to yards and terminals. Those are also good places to build the solution.

7. Pre-Merger Safeguards

The railroads acknowledge that the service disruptions which occurred in the last two mergers must not be repeated in future mergers. The suggestions put forth by the railroads call for additional detail in the operating or service plan, as well as the establishment of benchmarks to measure changes in service levels.

The provision of service plans were identified by the various railroads as, "Service Integration Plan", "Merger Implementation Plan", and "Integration Plan". These would have a greater level of detail and include mechanisms to accomplish the following: respond to service problems; identify potential areas of change; establish benchmark service measurements, and identify potential choke points or problem areas.

Many respondents, including many railroads would establish service benchmarks on both pre and post merger basis to evaluate the post merger environment. One railroad advocated that service guarantees be in place for the first two years after the effective date of the merger. Some of the benchmarks specifically identified were cycle times and transit times. Provision of the 100% traffic tapes of the railroad applicants was also suggested in lieu of the STB rail carload waybill sample. It was also suggested that the implementation plan be updated as traffic data and operating information become available.

Many suggested that a more searching review of the service plan, performance measures, and service parameters should be conducted by the STB. To aid in this review, one railroad put forth the suggestion that the STB should hire consultants, at applicants' expense, to evaluate the operating and service information submitted in the application. This is similar to the approach used to analyze and evaluate the submissions provided by applicants on environmental issues.

It was suggested that provision for a second identification be made by the STB and parties to the proceeding of issues that need to be addressed by applicants. A final observation made in railroad statements was that requiring more detail in the operating plan does not guarantee that merger related problems will not occur.

Comment

- The railroads have acknowledged that additional data is required from the applicants in the planning, operational and service areas to reduce the chances and magnitude of service disruptions in all future mergers. This is admirable in principle but for the most part the suggestions lack substance and detail.

- They appear to contain more preparation for the inevitable service disruption and how to handle it once it occurs.

- However, not one railroad suggested, as we and USDOT did, that all phases of the unified operation should be tested in a real time environment to confirm that they will work when the change over takes place.
  - This is in contrast to the practice of developing a system and testing it in a localized operating area or a laboratory setting, or not having it ready to cut over at all on the effective date.

- All of the data systems and operating systems must be in place and operational prior to the merger becoming effective.
  - Otherwise shippers will see a repeat of service problems, lost cars, mis-routings, etc. which are the same types of situations that they have experienced after the last two mergers.

- Our initial statement recommended that special attention be given to car tracing and identification functions as well as all the computer and data systems. This is by no

means the entire universe of areas that must be given intense attention and scrutiny during the merger process. These were only intended to be focal points and examples of where potential problems have arisen in past mergers.

Many respondents, including some railroads, recognized that benchmarks have to be established in a pre-merger environment in order to set a base line for measuring service levels and changes that occur post merger.

Comment

- Again, these suggestions, while constructive, were not completely identified as to which are meaningful in indicating trouble in specified service functions or operational areas. The level at which the benchmarks are to be developed was not provided in the railroads' statements.

- We, and some other respondents including USDOT, recommended that these benchmarks should be established for specific facilities and operating segments as opposed to the entire merged system. As the rail systems become ever larger in operating scope, statistics at the system level are less indicative of operating problems until the domino effect impacts major portions of the merged system. By this time the problem has attained devastating proportions.

- The suggestion to update the implementation plan is a good one. The operating plan included in the merger application is usually assembled well before the application is filed with the STB. As a result, it has been updated by the applicants

as traffic data and operational changes have been incorporated. This information is in a constant state of refinement, as it must be, and the STB usually does not have the latest version available to analyze. Updating this part of the application periodically will keep all parties to the proceeding better informed. We endorse this change as a positive step in improving the merger process.

- Three suggestions provided by the railroads work in conjunction with each other and will improve the quality of the analysis performed on the application. It was suggested that the STB perform a more searching review of the service plans, performance measures, and service parameters. It is widely known that the STB has limited resources with which to evaluate and analyze the monumental amount of data produced in a merger proceeding. The evidence produced during a merger requires specific knowledge and disciplines.

- When future mergers are filed the STB may or may not have the specific knowledge and/or the discipline and may not have the resources for a complete and through analysis of the data. With the current staffing level and pending retirements it is quite possible that the STB may not have the required expertise in-house when these "end game" mergers are filed.

- This sets the stage for the railroad suggestion that the STB use consultants in much the same manner and capacity as the STB does now for environmental issues and analysis.

- The STB's Section of Environmental Analysis (SEA) works in close cooperation with the consultants and oversees their work to be assured that it meets the requirements of the law, is complete and unbiased.

- We recommend that the STB adopt this approach for analyzing the operating plan, performance measures and service parameters. In conjunction with this, one of the railroads recommended that a second set of potential problem areas be responded to by applicants.
  - We concur. This parallels our recommendation of a "scoping order" to be issued by the STB as a vehicle to address questions that had arisen in specific areas during the analysis phase of the application. We also believe that this is a critical element in the evaluation of the operational aspects of the merger process. Issues dealt with and scrutinized prior to the effective date of the merger may alleviate or lessen some potential areas of service disruptions.

The railroads have observed that no amount of detail in an operating plan can guarantee that problems will not occur.

Comment

- It is difficult to take issue with this statement because so many areas can cause operating problems. However, what we, and the railroads and other respondents, can do is eliminate as many potential problem areas as possible prior to service failures and disruptions.

- The comments of the railroads illustrate very clearly that they, like all the parties that have filed statements in this proceeding, want the operations to go smoothly and service to remain within normal limits after the merger is approved.

- The common objective is to assure to the greatest extent possible that the problems experienced in the UP/SP and NS/CSXT/CR mergers are not repeated again.

- In view of the extensive scope of operations that will be covered by the applicants in the next round of mergers, the railroads, shippers and U.S. economy cannot withstand another operational meltdown. The recommendations we made in this proceeding can assist in developing a healthy rail transportation system that is fair and equitable to all parties.

8. Procedural Time Frame

Only two railroads commented on the procedural time frame that should be used to evaluate future mergers. The first stated that the time frame should be one year from the time the pre-filing notification is received by the STB. The rationale for this time frame is, '...to ensure that shippers, the public and railroads receive the benefits of mergers as quickly as possible..." A second railroad stated that the time frame should be one year unless the it was changed by the STB, based on circumstances of the particular merger under evaluation.

Comment

- In the past two mergers the STB has expedited the time frame to a point that perhaps in part resulted in the service disruptions that have persisted over three years.

- The benefits to the shippers and public have not materialized, as promised. In the NS/CSXT/CR merger the effective date was delayed almost one year and major and persistent service problems still occurred.

- We certainly do not want to see a repeat of the "Rock Island" situation, but setting a fixed one year time frame in view of the operating scope of future mergers would also be a mistake.

- The STB should set a procedural schedule after review of the notification to file has been received and adequate time has been allowed for the filing of potential transactions by competing railroads. This type of approach also demands that an outside time limit be set.

- We recommend that a two year time frame be used as an outside limit, and that this be shortened by the STB only when the circumstances of the proceeding allow. A window for filing by competing railroads also has to be established in order to avoid unnecessary delays in the merger process.

9. Inclusion of Canadian Railroads

The positions of many respondents on this issue, including USDOT and the U.S. railroads are quite different from those of the Canadian railroads. The U.S. railroads, with the exception of the BNSF, have stated that all data required of U.S. railroads should also be filed for the Canadian railroads. Data such as the operating plans, pre and post merger operational benchmarks, and all data on the combined system should be provided in the merger filings. NS pointed out that, in the BN-CN merger, the merger impact analysis that only impacted Canada would be excluded. The extent of this data would be decided by BNSF and CN. The U.S. railroads are asking for a full disclosure of data on the combined system.

CP and CN filed somewhat differing views on this issue. CP stated that the STB cannot discriminate against the Canadian railroads. CP further stated that they do not object to providing data on operational changes and competitive impacts. CN states that no special merger rules are required for Canadian railroads. They also point out that ownership of U.S. railroads by Canadian railroads in the past has not resulted in adverse impacts. They use the IC, GTW and SOO, as well as smaller railroads, as examples of no recognizable impacts. They also state that the issue of "Port shifts" between Canada and the U.S. is not an issue for the STB.

The comments and concerns of the U.S. railroads, excluding the BNSF, reflect the desire to have within the merger filings the complete operating plan, data integration, capital planning, etc. of the combined system. BNSF states that it will be a separate

operating unit. However, under one combined corporate umbrella there will be decisions made both operationally and financially that affect the entire combined system and not the BNSF or the CN-IC "units" in isolation.

Comment

- The statements by the Canadian railroads appear to take the position that they are being asked to provide data or materials beyond what is required of U.S. railroads within the merger process. The U.S. railroads are only asking that the Canadian railroads provide the same data as any other railroad provides.

- We recommend that the near-consensus U.S. railroad position be adopted by the STB in revising the merger rules. The Canadian railroads should not be treated any differently than a U.S. railroad when involved in a merger proceeding involving a U.S. railroad. There must be full disclosure of all evidence that supports the merger application in order for the STB to render a valid comprehensible decision.

- The merging railroads should not have the option to decide which data is provided to the STB. We do not believe that the intent of the ANPR was to discriminate against the Canadian railroads in any manner. Moreover, we concur with the USDOT thinking and disagree with the statement by the CN that the shifts between ports is not an issue for the STB.

- In our initial statement we discussed the need to require that Canadian railroads provide operating data and financial information on a basis equal to that currently

filed by U.S. railroads. As Canadian railroads merge with and form rate and operating agreements with U.S. railroads the need for cost and operating data is becoming more important. If joint line through rates are filed that involve movement on both Canadian and U.S. railroads it is almost impossible to adjudicate a rate complaint filed against that rate. As Canadian and U.S. railroads form more alliances through mergers or marketing agreements this situation will become more common. This situation has already been enhanced as a result of the NAFTA agreement. Even though BNSF states that they will remain a separate unit, the likelihood that joint line through rates will become a more common occurrence is a very distinct possibility.

- CN made the statement that historically no adverse impacts have resulted from Canadian ownership of U.S. railroads. While this may be true, the GTW, SOO, or even the IC do not have impact comparable to that which BNSF exerts on rail transportation within the U.S., and indeed North America. When this influence is coupled with the subsequent potential of a further merger with one of the eastern U.S. railroads we see an order of magnitude increase in potential impact compared to past mergers between Canadian and U.S. railroads.

10. Shipper Remedies for Service Deterioration

The railroads put forth several possible remedies that would be available to shippers in the event that service failures occurred in connection with future mergers. Some procedures even included detailed steps that would be followed and the requirements

necessary to invoke the process. The STB's procedures in Ex Parte 628, Expedited Relief For Service Inadequacies, were also offered as the basis for service remedies, on the basis that the current regulations are an effective remedy available to shippers.

The proposal was made that service standards should be included in contracts that would include financial consequences to the railroad for failing to meet those standards. The railroads are aware that service guarantees are only one of many elements in a contract. The entering of a contract between a shipper and a railroad comes at a price in that for the stated rate the railroad has a guaranteed traffic flow for a set number of years. Some railroads have been reluctant to set tight service performance standards, while others refuse to enter this element into a contract. The BNSF offered to incorporate service guarantees into their private contracts and they will be backed by financial incentives and will contain private enforcement mechanisms. Possible mechanisms were listed as mediation, arbitration or other efficient means.

The procedures that were suggested in detail, with time frames, involved the arbitration process and a procedure adjudicated by the STB. The arbitration procedure only applies to shippers that have contracts. The shipper must first wait until the merger has been in effect for six months before any action can be initiated. Arbitration is to be concluded within sixty days of the date the arbitrator is selected. Before the issues can be submitted for arbitration the shipper must notify the railroad of the service deficiencies and they have thirty days to improve performance. It is not clear at what point the arbitrator is selected. The contract can be terminated thirty days after the arbitrator's award.

Under this procedure until the contract issue is settled by the arbitrator the shipper cannot violate any volume guarantees included in the contract without being liable for damages under the terms of the contract, even though the quality of service has been inadequate for a minimum of four months.

Comment

- This is a totally unworkable procedure that will result in the shipper incurring financial damages and service disruptions while the process meanders along. This same railroad also offered a non-binding arbitration procedure. The benefits to the shipper that could be gained through this procedure are meager indeed. Their efforts would be better spent in trying to arrange alternative transportation. The proposed solution is so weakly structured as to be meaningless. Revamping the parameters for delay and percentage of decline in service could rescue this proposal.

The proposed remedy that involves the STB requires a fifty percent (50%) increase in service measurements, based on the pre-merger benchmark before the relief can be sought by the affected shipper. The service level has to be deficient by fifty percent for at least sixty consecutive days before any action can be taken by the shipper. After sixty days, the shipper notifies the railroad and they then have an additional sixty days to remedy the service problem.

Only after enduring one hundred and twenty days of inadequate service can the shipper complain to the STB. The STB has thirty days to grant relief. This process consumes approximately one hundred and fifty days or five months before the shipper has any possibility of relief. This procedure, as was the previously discussed remedy, is totally inadequate as a remedy for service problems. The setting of a flat increase in an operating benchmark as the threshold for consideration is the one positive aspect of the procedure.

Comment

- It is not appropriate to use fifty percent as a universal threshold for all shippers and their commodities. Those shippers with time sensitive freight may not be able to accept a fifty percent increase, while others could adjust their production schedules to accommodate this delay. Many shippers that have experienced the service disruptions in the last two mergers would have been thankful to have the transit delays top out in the fifty percent range. For many others, fifty percent would be ruinous.

- We note also that many service disruptions are not related strictly to car cycles and transit time. These involve the pickup and delivery of cars at the shipper's plant. Service that is provided to a shipper five days a week and then reduced to three days a week (less than fifty percent) may result in production related and other types of problems. This is especially true when rail car storage at the plant is limited and the availability of empty cars is limited or non-existent.

- Damage occurring to a shipper because of service is based on many individual factors that can differ markedly from one shipper to the next.

- We recommend that the STB adopt some type of percentage differential between pre and post merger service levels that would constitute "a service disruption" whereby the shipper could avail itself of remedies before the STB, and/or the courts. The definition of the differential needs more work, as UP recognizes.

- Transportation contracts between shippers and railroads could include service guarantees as a mandatory term. One of the railroad comments in regard to the issue of remedies stated that contracts not arbitration should be used by shippers to collect damages for service failures. While we agree with this proposal in principle we observe in practice that it is not always easy to get railroads to agree on performance standards during contract negotiations.

- The use of the STB procedures in Ex Parte 628, Expedited Relief For Service Inadequacies, has also been characterized as an effective tool in dealing with service problems. The STB has shown reluctance to impose substituted service and allow other railroads in to operate over lines of the recently merged system. We find that while the regulations may be an effective tool, their implementation by the STB has had less than the desired results solving the service disruptions that have occurred.

11. "Three-to-two" Issues

The railroads' comments did not dismiss the consideration of three-to-two points in future merger proceedings. Almost unanimously they believe that this situation should be considered on a case-by-case basis.

Comment

- We agree that where this situation continues to exist and would be affected by a merger proceeding it should be resolved on the particular circumstances of that instance.

- Simply put, very few of these situations remain. And that is part of the problem.

III. Some Thoughts on Merger Benefits

Many of the initial statements of the larger Class I railroads extol the benefits of merging two or more rail systems. These benefits include: single line service, more efficient utilization of equipment; enhanced economies and product differentiation through increases in length of haul; combining low density routes into more efficient use of capital assets, etc.

These types of benefits result in lower service costs, lower operating ratios, higher capitalization and other financial benefits. As part of our transportation practice we assist as technical advisers in contract negotiations. When contracts are negotiated the rates offered by the railroads are consistently and predictably lower when inter-modal or intra-modal competition exists.

The point is that productivity and operational gains accruing to the merged system may not flow to the shipper. This is evident in the annual escalation of rates used in some contracts. Many railroads seek a flat percentage increase or the RCAF-U as the basis of the annual increase to the rates. The RCAF-U is the Rail Cost Adjustment Factor that is unadjusted for productivity gains.

Comment

- Railroads can be quite reluctant to share with shippers the cost savings gained through productivity. The STB should be aware that benefits to the merging railroads do not necessarily translate to shipper benefits. However, the additional operating costs incurred by the railroads during service disruptions often are now automatically added to the cost base for the purpose of determining a shipper's rates. Under this scenario the shipper absorbs the risk but may miss the reward. A better balance is advisable.

- Many respondents suggested in their initial statements that extraordinary expenses incurred by railroads during service failures should be excluded from the rate base. We agree that the financial penalties incurred by the railroads for managerial errors in connection with a merger should not automatically be passed through to the rate payers. This same principle would apply regarding excessive purchase premiums paid in connection with mergers. The STB should also address these aspects in the revised merger guidelines

IV. Conclusion

The next round of mergers will almost certainly lead to the final consolidation of the railroad industry into two transcontinental systems. Without clear policy direction from the STB, this duopolized industry will lose its competitiveness and efficiency. Our original recommendations have been reinforced by dozens of respondents, including shippers, government agencies and some railroads. Again we recommend that the STB should adopt three policy options.

The first policy option would increase protection for shippers by permitting them to challenge a bottleneck rate on its own merits without masking the bottleneck rate in the rates and charges for the other segments of the movement.

The second policy option would adopt a range of strategies for increasing access by shippers to alternative rail carriers. These include haulage and trackage rights, interswitching, and competitive line rates.

The third policy option would develop and apply meaningful service benchmarks, incentives and guarantees within a phased process as part of the merger review and monitoring process.

Failure to adopt these and similar pro-competitive policy initiatives, combined with the effects of the final wave of railroad mergers, would seriously hinder a wide

range of shipper industries and ultimately redound to the disadvantage of the railroads themselves.

The essential test of the regulatory policies is how efficiently and effectively they generate competitive alternatives. If the regulatory policy enables the creation of competitive alternatives, market forces will complete that process and generate mutually satisfactory solutions.

As has been shown in this statement, and reinforced by many other respondents, policy options are now available to the STB which can remedy the detrimental effects of the coming wave of rail mergers while promoting financial health of the entire supply chain; supplier, shipper, customer and railroad.

I recommend that STB adopt these responsive and effective policy options within the Three Phased Merger Approval Process:

- Corporate Merger;
- Business Merger and
- Operational Merger.

V. Qualifications

Experience

Snavely King Majoros O'Connor & Lee, Inc., Washington, DC

- **Vice President (1988-Present)**

Mr. O'Connor has more than twenty five years experience in the transportation industry. His experience includes key and increasingly responsible management and policy positions with government agencies and private industry.

Mr. O'Connor, in recent years has conducted analyses for the Government of Canada used to shape policy for freight transportation transport policy. He also has developed the Master Plan for Management Information Systems and computer facilities to measure, manage and monitor both rail freight and rail passenger transportation for the Bulgarian State Railways, in Bulgaria and the Balkan Peninsula. He has created and managed numerous computerized transport management and regulatory systems and is a widely recognized expert on costing and economics.

Mr. O'Connor has analyzed more than 45 rail merger scenarios and cases. He has provided expert testimony before state and federal courts and commissions in the U.S. and Canada on economic and policy issues. He has also testified as an expert on computerized transportation analytical systems, rail operations, anti trust issues and transportation costing. Mr. O'Connor also has served as an impartial and expert monitor of data and processes at issue in litigation on transportation.

Within the litigation arena, Mr. O'Connor has also conducted management audits of railroads, focused on identifying the cause and effect relationships underlying claimed cost incidence. The management audits were directed toward testing the cost basis of bills submitted by major railroads.

DNS Associates Inc., Washington, DC

- **Vice President (1982 - 1988)**

Mr. O'Connor directed and participated in numerous projects including merger analyses, transportation infra-structure analyses, plant and network rationalization and feasibility studies. He designed and implemented mainframe and microcomputerized systems for analyzing rail, truck and barge logistics. The computerized cost systems Mr. O'Connor created are in widespread use throughout the United States and Canada.

Mr. O'Connor also advised the U.S. Rail Accounting Principles Board on the costing aspects of regulatory reform policies. He also provided expert testimony on computerized data bases and cost systems and related rail cost issues before the Interstate Commerce Commission.

Association of American Railroads, Washington, DC

- **Assistant Vice President, Economics (1979 - 1982)**

Mr. O'Connor designed and managed major economic analysis projects. He helped

formulate industry economic policy positions culminating in the Staggers Rail Act of 1980. He submitted expert testimony on behalf of the railroad industry in numerous cases before the Interstate Commerce Commission and state regulatory commissions. He also appeared regularly in national forums on economic issues.

Mr. O'Connor directed the most significant computerized industry Costing System project in 40 years, URCS, the cost system now used by all major US railroads. He also conducted industry seminars on URCS and related economic issues.

Mr. O'Connor also testified before the Interstate Commerce Commission on the design and application of this pathbreaking rail cost system since adopted by the Commission and the rail industry.

He also directed development and installation of a commercial computerized economic and market analysis system now used by virtually all major US railroads.

Consolidated Rail Corporation, PA

- **Assistant Director, Cost & Economics (1977 - 1979)**

Mr. O'Connor was responsible for all Conrail management and regulatory cost analyses in both freight and passenger areas. He testified before the ICC on the development of subsidy standards now widely used in the US railroad industry. He also finalized the design, and implemented and managed Contribution Simulator and Calculator (COSAC), a computerized internal management economic analysis

system at Conrail. The COSAC system uses specific management accounting data to develop economic costs. COSAC replaced earlier systems and was used to guide virtually all transportation management decisions.

Mr. O'Connor also participated in cost allocation negotiations between Amtrak and Conrail on cost sharing of joint facilities on the North East corridor. He initiated and directed profit maximization and plant rationalization programs. He also designed and implemented computerization and improvement of a wide range of economic and cost analysis systems used to manage this multi-billion dollar corporation.

R.L. Banks & Associates Inc., Washington, DC

- **Consultant (1976 - 1977)**

Mr. O'Connor conducted and directed numerous transportation- related projects in the U.S. and Canada ranging from national logistics analyses to site-specific studies. He specialized in costing systems and appeared as an expert witness on such systems in a precedent setting proceeding before a Canadian Crown Commission.

U.S. Railway Association, Washington, DC

- **Manager, Local Rail Service Planning (1974 - 1976)**

Mr. O'Connor developed, computerized and implemented the light density lines cost analysis system, which defined Conrail. He served as liaison with congressional staffs and shipper groups, as well as federal, state, and local governments, and planning agencies. The system he created was a major element in the design and

implementation of the streamlined Midwest-Northeast regional rail system. Mr. OConnor subsequently appeared as an expert witness to present and defend the operation of the USRA costing system.

Interstate Commerce Commission,

- **Economist, Washington, DC (1973-1974)**

Mr. O'Connor served as a staff economist and authored a report analyzing industry investment patterns and ICC regulatory policy, including ICC use of cost evidence.

Education

- University of Massachusetts, Amherst, B.A. Economics
- University of Wisconsin, Graduate Course Work, Economics
- University of Delaware, Graduate Course Work, Business Management
- The American University, Graduate Course Work, Computer Science

Professional Organizations

- Transportation Research Board
    - Former Chairman Surface Freight Transportation Regulation Committee
- Transportation Research Forum
    - Former President of the Cost Analysis Chapter
- National Defense Transportation Association
    - Member of Board of Directors, National Capital Chapter
- Phi Beta Kappa academic honors society
- Phi Kappa Phi academic honors society

Military

- U.S. Army; Sergeant, Combat Engineers

Security Clearance

- Secret

VERIFICATION

I, Tom O'Connor, declare under penalty of perjury that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement. Executed on May 25, 2000.

Tom O'Connor

Subscribed and sworn to before me this 25th day of May, 2000 in the District of Columbia.

Notary Public

My Commission expires: April 30, 2001

Notice of Service

Copies of this Verified Statement and the accompanying Comments were served by first class mail on the Parties of Record for Ex Parte 582 (Sub No.-1).

Tom O'Connor